Supreme Court, U.S.
FILED
96 905 DEC 6 1996
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE CITY OF TULSA, OKLAHOMA,
a municipal corporation,

Petitioner,

v.

B.N. SPRADLING, B.C. DOW, J.D. FELLINGER, L.M. LAMB, ROBERT L. McCLARY, PHILIP MORGANS, EDGAR LEON WILSON, F.L. COOK, D.R. GRANT, E.L. SIMPSON, THOMAS E. HOLLAND, ROBERT E. NANTZ, BILLY JOE GEIER, KEN LORTON, and BILLY J. RICHARDSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD W. BERGMANN*
NOAH A. FINKEL
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

DAVID L. PAULING
ELLEN R. HINCHEE
City Attorney
200 Civic Center
Room 316
Tulsa, Oklahoma 74103
(918) 596-7717

Attorneys for Petitioner

*Counsel of Record

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

82 pp

QUESTIONS PRESENTED

1. Whether a group of employees' pay is "subject to" reduction within the meaning of the Secretary of Labor's "salary basis test," 29 C.F.R. § 541.118(a)(5), where their employer stipulated that it has a policy under which the employees' pay is subject to being reduced, but where the employer has never reduced the pay of any of the employees and where the employer has not reduced the pay of any employee in the same classification as the employees since the Fair Labor Standards Act has applied to the employer.

2. Whether the Secretary of Labor's interpretations of the salary basis requirements for the executive and administrative exemptions in the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1), apply to a governmental body.

PARTIES BELOW

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. THIS CASE PRESENTS AN ISSUE SUBSTANTIALLY SIMILAR TO ISSUES ALREADY PENDING BEFORE THIS COURT	7
CONCLUSION	10

APPENDICES

	APP. PAGE
A—Decision of the United States Court of Appeals for the Tenth Circuit	A-1
B—Decision of the United States District Court for the Northern District of Oklahoma	B-1
C—Appended Statutes and Regulations	C-1
D—Stipulations	D-1
E—Affidavits	E-1

TABLE OF AUTHORITIES

Cases:	PAGE
Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta, 920 F.2d 800 (11th Cir. 1991)	5
Auer v. Robbins, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, No. 95-897, ___ U.S. ___, 116 S. Ct. 2545 (1996)	*passim*
Spradling v. City of Tulsa, 95 F.3d 1492 (10th Cir. 1996)	*passim*
Barner v. City of Novato, 17 F.3d 1256 (9th Cir. 1994)	5
Carpenter v. City & County of Denver, 82 F.3d 353 (10th Cir. 1996)	4, 5
Hurley v. State of Oregon, 27 F.3d 392 (9th Cir.)	5
Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993)	5
Klein v. Rush-Presbyterian-St. Luke's Medical Center, 990 F.2d 279 (7th Cir. 1993)	5
Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 298 (1992)	5
McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1188 (1994)	7
Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections, 992 F.2d 82 (6th Cir. 1993)	5
York v. City of Wichita Falls, 944 F.2d 236 (5th Cir. 1991)	5

Statutes and Regulations:

28 U.S.C. § 1254(1)	1
29 U.S.C. § 207(a)(1)	2
29 U.S.C. § 207(k)	2
29 U.S.C. § 213(a)(1)	2, 9
29 C.F.R. § 541.1	2
29 C.F.R. § 541.2	2
29 C.F.R. § 541.3	2
29 C.F.R. § 541.5d	8
29 C.F.R. § 541.118	*passim*
29 C.F.R. § 552.201	2
29 C.F.R. § 553.230	2
29 C.F.R. § 825.206	3

OPINIONS BELOW

This petition seeks review of the decision of a panel of the United States Court of Appeals for the Tenth Circuit, which is reported as *B.N. Spradling et al. v. City of Tulsa, Oklahoma*, 95 F.3d 1492 (10th Cir. 1996), and reproduced at pages A-1 through A-28 in the Appendix to this petition. The decision of the United States District Court for the Northern District of Oklahoma is unreported and is reproduced at pages B-1 through B-18 in the Appendix.

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on September 13, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). No petitions for rehearing or hearing en banc were filed.

STATUTES AND REGULATIONS INVOLVED

Section 213(a)(1) of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. § 213(a)(1), exempts executive, administrative, and professional employees from the overtime requirements of the Act, and is reproduced at page C-1 in the Appendix to this petition. The Secretary of Labor's definitions of "executive," "administrative," and "professional" employees are found at 29 C.F.R. §§ 541.1, 541.2, and 541.3 and are reproduced at pages C-1 through C-6 in the Appendix. The Secretary of Labor's regulations concerning the "salary basis test", 29 C.F.R. § 541.118, are set forth at pages C-6 through C-10

of the Appendix. Finally, the Secretary has promulgated "[s]pecial provisions applicable to employees of public agencies" found at 29 C.F.R. § 541.5d. They are reproduced at pages C-10 through C-11 of the Appendix.

STATEMENT OF THE CASE

Under the Fair Labor Standards Act ("FLSA" or "Act"), an employer must pay an employee at one and one-half times that employee's regular rate of pay for all hours worked in one week in excess of 40 hours unless that employee is exempt from the Act. 29 U.S.C. § 207(a)(1).[1] The FLSA exempts from its overtime requirements any employee employed in a "bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])." 29 U.S.C. § 213(a)(1), Pet. App. C-1.

In order for an employee to fit within the overtime-exempt category for executive, administrative, or professional employees under the Department of Labor's ("DOL") regulations, his or her employer must show that the employee (i) is paid on a salary basis (ii) at a rate of not less than $250 per week, and (iii) that the employee meets the duties test. 29 C.F.R. §§ 541.1 (executive), 541.2 (administrative), 541.3 (professional), Pet. App. C-1 to C-6. This case concerns only the salary basis test.

---

[1] Section 7(k) of the Act, however, establishes that public employers need not pay overtime compensation to firefighting personnel until they work in excess of 68 hours in a nine-day work period or up to 212 hours in a 28-day work period. 29 U.S.C § 207(k); 29 C.F.R. §§ 552.201 and 553.230.

Under the DOL's regulations, an employee is considered to be paid "on a salary basis" if the employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed." 29 C.F.R. § 541.118(a), Pet. App. C-1 to C-6. As a general rule, an employee paid "on a salary basis" must "receive his full salary for any week in which he performs any work without regard to the number of days or hours worked," but need not be paid for any week in which he performs no work. *Id.*

There are a few exceptions to that general rule. One is that "[d]eductions may be made . . . when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident." 29 C.F.R. § 541.118(a)(2), Pet. App. C-7. "Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences." *Id.* "Deductions may also be made for absences of a day or more occasioned by sickness or disability . . . if made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability." 29 C.F.R. § 541.118(a)(3), Pet. App. C-7. Finally, an employer may make deductions from an employee's salary for "infractions of safety rules of major significance," 29 C.F.R. § 541.118(a)(5), Pet. App. C-8, or for absences taken pursuant to the Family Medical Leave Act, 29 C.F.R. § 825.206, without affecting an employee's salaried status.

Respondents are fifteen District Fire Chiefs ("District Chiefs" or "Respondents") of the City of Tulsa, Oklahoma

who sued their employer, Petitioner City of Tulsa ("City" or "Petitioner"), for back overtime wages under the FLSA. The District Chiefs and the City entered into the following stipulations:

> 2. By unwritten City policy, Plaintiffs are, and have been at all pertinent times, subject to having their pay reduced for absences of less than a day:
>
> – if they have sick leave, vacation leave, or compensatory time accumulated, those could be reduced to account for the absence;
>
> – if they do not have sufficient accumulations of the above, then Plaintiffs' pay is subject to being docked . . .
>
> 4. By written City policy, Plaintiffs' pay is, and at all pertinent times was, subject to reduction as a form of discipline, including suspension without pay, imposition of a fine, and demotion.
>
> 5. No such reductions have occurred to any of the Plaintiffs. In 1982, the City of Tulsa did suspend without pay District Fire Chief B.J. Reeves (now retired) as discipline for failure to attend a meeting.

Pet. App. D-1 to D-2.

On cross motions for summary judgment, the district court held that the District Chiefs are not exempt administrative or executive employees because they are not paid on a salary basis. Pet. App. B-2 to B-12. The court of appeals affirmed the district court's judgment in favor of the District Chiefs, holding that, under Tenth Circuit precedent,[2] the District Chiefs are not paid on a salary

---

[2] The Court, citing *Carpenter v. City & County of Denver*, 82 F.3d 353, 359 (10th Cir. 1996), held that "if an employer's (continued...)

basis because of the *possibility* of an improper reduction in a District Chief's pay, even though none of the District Chiefs had suffered such a deduction. Pet. App. A-19 and A-23. The court relied on the above stipulations and, as further evidence that the City allows the District Chiefs' pay to be reduced, "that district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance." Pet. App. A-23.[3] The court of appeals

---

[2] (...continued)
policy concerning absences of less than one day merely creates the possibility of a reduction in pay, the 'salary' test is not met with respect to employees subject to that policy." Pet. App. A-19. In *Carpenter*, the Tenth Circuit joined those Circuits holding that the existence of an employer policy under which an employee's pay could be docked, even if the employee's pay has not been docked, indicates that employees subject to this policy are not paid on a salary basis, and therefore are not exempt from the overtime requirements of the Act. *Hurley v. State of Oregon*, 27 F.3d 392, 395 n. 7 (9th Cir.); *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 285 (7th Cir. 1993); *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 298 (1992). The Tenth Circuit rejected the holdings from other circuits that only actual, improper deductions, and not the mere existence of policies, show that an employee is not paid on a salary basis. *Auer v. Robbins*, 65 F.3d 702, 710 (8th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 2545 (1996); *Barner v. City of Novato*, 17 F.3d 1256, 1261-62 (9th Cir. 1994); *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

[3] The court of appeals' statement that the district court found uncontroverted evidence "that district chiefs have been dis-
(continued...)

did not address the City's arguments that those deductions did not occur to any of the District Chiefs involved in this litigation and that the deductions occurred prior to the date in which the FLSA became applicable to public employers such as the City, apparently finding that such deductions prior to the that time are evidence that the District Chiefs in this case face the possibility of an improper reduction in pay.

Finally, the court of appeals rejected the City's argument that the salary basis test is arbitrary and capricious, and therefore invalid, as applied to public employers. Pet. App. A-8 to A-13.

The issues presented in the present case are nearly identical to the issues presented before this Court in *Auer, et al. v. Robbins, et al.*, No. 95-897. There the Court is reviewing, among other things, whether the salary basis test applies to public employment, and whether employees' pay is "subject to" reduction in violation of 29 C.F.R. § 541.118(a) merely because they are governed by an employer policy that creates the possibility of an improper deduction. If this Court holds in *Auer* that the

---

[3] (...continued)
ciplined on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance" refers to Plaintiffs' Exhibits 17, 18A, and 18B. Pet. App. A-23. These three affidavits swear that (i) a District Chief's accrued vacation leave was reduced because of an absence, and (ii) the Tulsa Fire Chief fined or suspended without pay two District Chiefs who are not involved in this litigation for violations of fire department rules. Pet. App. E-1 to E-4. These District Chiefs' fines or suspensions occurred "prior to 1986," *id.*, and therefore prior to the year in which the FLSA became applicable to public employers such as the City.

salary basis test does not apply to public employment, or that the mere possibility of an improper deduction does not render an employee non-exempt, then the Tenth Circuit's decision in the present case could be reversed.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN ISSUE SUBSTANTIALLY SIMILAR TO ISSUES ALREADY PENDING BEFORE THIS COURT.

Last term, the Court granted a petition for certiorari to the Court of Appeals for the Eighth Circuit in *Auer, et al. v. Robbins, et al.*, No. 95-897 (*granting cert.* to 65 F.3d 702 (8th Cir. 1995)). That case is presently before the Court. In *Auer*, the Eighth Circuit rejected the contention of the police sergeants of the St. Louis Police Department that they were not paid on a "salary basis" because the police department's disciplinary policy authorizes less than one-week suspensions without pay for violations of rules that are not safety rules of major significance, finding that under Eighth Circuit precedent, "the mere possibility of an improper deduction" from pay does not defeat an employee's salaried status." *Auer*, 65 F.3d at 710 (citing *McDonnell v. City of Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1188 (1994)).

The court also rejected the argument that a single two-day suspension without pay of one police sergeant for violating a residency requirement rendered all the sergeants, or even the sergeant who suffered the suspension, nonexempt because a "one-time deduction . . . does not automatically require the determination that all

sergeants are nonsalaried." *Id.* The court reasoned that the salary basis test's "window of correction" permits an employer who makes an improper deduction in an employee's salary to maintain that employee's exempt status when there is a "one-time . . . failure to adhere to § 541.118(a)'s requirements," that the police department subsequently and expressly abandoned its policy permitting suspensions in cases of violations of its residency requirement, and therefore, this "disciplinary incident was a one-time incident and can never reoccur." *Id.* at 711. In a footnote, the court recognized the conflict between the Seventh and Ninth Circuits as to whether the salary basis test is invalid as applied to the public sector, but did not reach this question because it held in favor of the police department on other grounds. *Id.* at 710 n. 6.

The police sergeants filed a petition for a writ of certiorari in which it presented the following questions to the Court, among others:

> 1. Does the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") salary basis test of "white collar" FLSA exemptions apply to the public employees?
>
> 2. Do the United States Department of Labor ("DOL") FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118(a)(5), which require the loss of exempt status when an employee is "subject to" non-safety disciplinary suspension of less than a pay period apply only in cases of actual suspension or does DOL's interpretation that a personnel rule subjecting employees to discipline alone result in loss of exempt status control the application of the rule?

Pet. for Cert., *Auer, et al. v. Robbins, et al.*, Case No. 95-897, at page (i). The Court granted this petition on June 24, 1996.

These are substantially the same, important questions as presented in this petition:

1. Whether a group of employees' pay is "subject to" reduction within the meaning of the Secretary of Labor's "salary basis test," 29 C.F.R. § 541.118(a)(5), where their employer stipulated that it has a policy under which the employees' pay is subject to being reduced, but where the employer has never reduced the pay of any of the employees and where the employer has not reduced the pay of any employee in the same classification as the employees since the Fair Labor Standards Act has applied to the employer.

2. Whether the Secretary of Labor's interpretations of the salary basis requirements for the executive and administrative exemptions in the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1), apply to a governmental body.

Supra, at page (i). The questions presented in this petition concern the same conflict among the circuits regarding the interpretation of the Department of Labor's salary basis test and whether it constitutionally applies to the public sector.[4]

---

[4] Although the Court of Appeals held in part that there is "uncontroverted evidence" that the "district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance," *Spradling*, 95 F.3d at 1503, Pet. App. A-23, a holding by this Court that only actual deductions from pay render an employee nonsalaried likely would cause the Court of Appeals to reverse itself upon remand because no "improper" deductions have occurred during the period that the City has been covered by the FLSA. *See* footnote 2, *supra*.

CONCLUSION

For the reasons set for the above, Petitioner respectfully requests that this petition for certiorari be granted.

Respectfully submitted,

EDWARD W. BERGMANN*
NOAH A. FINKEL
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000

DAVID L. PAULING
ELLEN R. HINCHEE
City Attorney
200 Civic Center
Room 316
Tulsa, Oklahoma 74103
(918) 596-7717

Attorneys for Petitioner

*Counsel of Record

APPENDIX A

[Filed September 13, 1996]

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

B.N. SPRADLING, B.C. DOW, J.D. FELLINGER, L.M. LAMB, ROBERT McCLARY, PHILIP MORGANS, EDGAR LEON WILSON, F.L. COOK, D.R. GRANT, E.L. SIMPSON, THOMAS E. HOLLAND, ROBERT E. NANTZ, BILLY JOE GEIER, KEN LORTON, BILLY J. RICHARDSON,	)	No. 95-5162
Plaintiffs-Appellees,	)	
v.	)	
CITY OF TULSA, OKLAHOMA, a municipal corporation,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 92-C-414-E)

Submitted on the briefs:

David L. Pauling, City Attorney, and Ellen R. Hinchee, Assistant City Attorney, Tulsa, Oklahoma, and Edward W. Bergmann and Noah A. Finkel of Seyfarth, Shaw,

Fairweather & Geraldson, Chicago, Illinois, for the appellant.

Donald M. Bingham, of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Tulsa, Oklahoma, for the appellees.

Before TACHA, BRISCOE, and MURPHY, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant City of Tulsa, Oklahoma, (City) appeals the district court's decision granting relief in favor of plaintiffs, a group of fifteen Tulsa firefighters, on their claim for additional overtime pay under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219. We affirm.

I.

Each plaintiff holds the rank of District Fire Chief (except plaintiffs E.L. Simpson and Billy J. Richardson, who are now retired). Plaintiffs filed this action on or about May 12, 1992, seeking compensation for alleged unpaid overtime wages. According to plaintiffs, they typically work a repeating cycle of one 24-hour tour of duty, followed by 48-hours off-duty, but receive no overtime pay. Plaintiffs further allege they are required to attend training sessions and staff meetings but receive no overtime compensation for time spent in these sessions and meetings.

In defending the action, the City characterized plaintiffs as exempt salaried employees under the FLSA. Although plaintiffs stipulated they met most of the criteria

for "administrative" and "executive" exemptions under the FLSA, they denied that they met the "salary" test set forth in 29 C.F.R. § 541.118. After engaging in discovery, the parties waived a jury trial and jointly requested that the district court determine the issue of FLSA exemption as a matter of law.

On January 27, 1995, the district court issued a written order granting summary judgment in favor of plaintiffs. In its order, the court applied the "salary" test and found that: (1) plaintiffs were paid an hourly rate, with provisions made for the accumulation of overtime; (2) plaintiffs' pay was subject to reduction for absences of less than a day; (3) plaintiffs could be disciplined by reductions in pay for reasons other than infractions of safety rules of major significance; and (4) plaintiffs were subject to reductions in pay for absences due to temporary military leave after City-paid military time had been exhausted, and for absences due to attendance in court as witnesses. Based upon these findings, the court concluded the City had failed to demonstrate that plaintiffs were salaried employees. The court rejected the City's assertion that the FLSA's "salary" test was inapplicable to public employers and concluded plaintiffs were entitled to receive overtime compensation. After a nonjury trial on the issues of willfulness and liquidated damages, the court awarded plaintiffs damages in the amount of $333,881.46 plus interest. The court rejected plaintiffs' claim for liquidated damages on the ground that the City's violation of the FLSA was made in good faith. Final judgment was entered on July 17, 1995, and the City filed its notice of appeal on August 10, 1995.

II.

The City has the burden of proving plaintiffs were exempt employees under the FLSA. *Aaron v. City of Wichita*, 54 F.3d 652, 657 (10th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 419, 133 L.Ed.2d 336 (1995). We review the district court's factual findings for clear error and its ultimate conclusion concerning applicability of the City's claimed exemptions de novo. *Id.*

III.

A. The FLSA's exemptions and related salary test

Under the FLSA, an employer must pay an employee overtime compensation at one and one-half the employee's regular rate of pay for all hours worked by the employee in a given week in excess of forty hours. 29 U.S.C. § 207(a)(1). Notably, the FLSA exempts from its overtime compensation requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Here, the City contends plaintiffs fall within the "executive" and/or the "administrative" exemption(s) and are therefore not entitled to the claimed overtime compensation.

The "executive" and "administrative" exemptions are not specifically defined in the FLSA. Rather, the Department of Labor (DOL) is responsible for determining the operative definitions of these terms through interpretive regulations. 29 U.S.C. § 213(a)(1). Generally, DOL regulations are entitled to judicial deference, *see Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), and are the primary source of guidance for

determining the scope and extent of exemptions to the FLSA.

In order to satisfy the overtime exemption for "administrative" or "executive" employees, an employer must satisfy a two-part test promulgated by the DOL, the "duties" test and the "salary" test. *Barner v. City of Novato*, 17 F.3d 1256, 1259-60 (9th Cir. 1994). Exemptions are to be narrowly construed, and the employer bears the burden of showing "the employee fits 'plainly and unmistakenly within the exemption's terms'—under both the 'salary' test and the 'duties' test." *Aaron*, 54 F.3d at 657 (quoting *Reich v. State of Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993)). Here, the parties agree the City can satisfy the "duties" test. Only the "salary" test is at issue.

To satisfy the "salary" test, "the employer must prove that the employees in question are paid on a salary basis rather than an hourly rate." *Aaron*, 54 F.3d at 657-58. Under 29 C.F.R. § 541.118(a), an employee is compensated on a salary basis if "under his employment agreement he regularly receives each pay period . . . a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." Under 29 C.F.R. § 541.118(b), "the salary may consist of a predetermined amount constituting all or part of the employee's compensation," and "additional compensation besides the salary is not inconsistent with the salary basis of payment."

B. Public sector employers and the FLSA's salary test

As initially enacted in 1938, the FLSA did not apply to public employers or employees. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1149-50 (10th Cir. 1992) (discussing history of FLSA and its application to public sector employees), *cert. denied*, 507 U.S. 972, 113 S.Ct. 1414, 122 L.Ed.2d 785 (1993); *see also* 57 Fed.Reg. 37,666-68 (1992) (same). In 1974, Congress amended the FLSA in an attempt to bring public employees within the scope of the Act. Fair Labor Standard Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58, 60, § 6(a)(1), (a)(6). In 1976, however, the Supreme Court struck down the amendment and held that extending FLSA coverage to state and city governmental employees was inconsistent with state sovereignty. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In 1985, the Supreme Court reversed itself and upheld the constitutionality of including public sector employees within the scope of the FLSA. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). Although Congress subsequently amended the FLSA in order to accommodate "the particular needs and circumstances of the States and their political subdivisions," S.Rep. No. 159, 99th Cong., 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655, Congress did not specifically address whether the salary test, which was promulgated by the DOL years earlier, should apply to the public sector. *See* Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, 99 Stat. 787.

In 1987, the DOL announced that, pending revision of its implementing regulations, it would not enforce the

portions of the salary test concerning deductions for absences of less than a day for personal reasons, illness, or accident. *See* Fed.Reg. 37,668 (1992). Notably, this nonenforcement policy applied only with respect to those public sector employers who could demonstrate they were governed by a public accountability law, i.e., a provision in applicable State or local law that prohibited payments to an employee for absences of less than one day due to personal reasons, illness, or accident. *See id.* Moreover, notwithstanding this nonenforcement policy, the DOL did not bar employees' claims against public employers, including those governed by public accountability laws. *See id.*

On September 6, 1991, the DOL passed an interim final regulation providing "that an otherwise exempt public sector employee who is paid according to a pay system that requires the use of paid leave and, absent the use of paid leave, reduces the employee's pay for absences of less than one work-day, will not be disqualified from exemption due to such pay system." 56 Fed.Reg. 45,824 (1991). This interim final regulation effectively allowed state and local employers to continue to use pay systems based upon public accountability laws without losing "executive," "administrative," or "professional" exemptions for otherwise qualified employees. *See id.*

On August 19, 1992, the DOL published its final regulation on this issue, codified at 29 C.F.R. § 541.5d, which provides in pertinent part:

> (a) An employee of a public agency who otherwise meets the requirements of § 541.118 [the salary test] shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 [the executive, administrative, and professional exemption regulations] on the basis

that such employee is paid according to a pay system established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one workday when accrued leave is not used by an employee because—

(1) permission for its use has not been sought or has been sought and denied;

(2) accrued leave has been exhausted; or

(3) the employee chooses to use leave without pay.

See 57 Fed.Reg. 37,677 (1992).

C. The City's issues on appeal

1. Did the district court err in concluding the salary test was applicable to public employers such as the City?

Following the lead of other public employers recently embroiled in FLSA litigation, the City argued the salary test, as applied to public sector employers, is arbitrary and capricious and therefore invalid. The district court rejected the City's argument. On appeal, it is unclear whether the City is challenging only the salary test as it existed prior to the DOL's modifications in 1991-92, or is also challenging the current (post-September 6, 1991) salary test. We will assume the City is challenging both.

The principles for reviewing the City's challenge are well established. In reviewing an agency's interpretation of a statute which it is charged with administering, a

court must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). If Congress has directly spoken to the precise question and its intent is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. at 2781. If, however, Congress has not addressed the precise question at issue, the court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* In cases such as the one at bar, where "Congress explicitly delegates responsibility for completing a statutory scheme by defining key terms . . . without supplying criteria for the exercise of the delegated responsibility, the scope of judicial review is extremely limited," and "about all the court can do is determine whether the agency's action is rationally related to the objectives of the statute containing the delegation." *Mueller v. Reich*, 54 F.3d 438, 442 (7th Cir. 1995) (construing validity of §§ 541.118 and 541.5d).

Only the Seventh and Ninth circuits have considered similar challenges to the validity of the salary test. *See Service Employees Intern. Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1994) *(SEIU), cert. denied*, ___ U.S. ___, 116 S.Ct. 774, 133 L.Ed.2d 726 (1996); Mueller, 54 F.3d at 440-43. Both courts agreed that Congress did not specifically address whether the salary test should apply to the public sector. *SEIU*, 60 F.3d at 1351; *Mueller*, 54 F.3d at 442. However, examining different aspects of the salary test, the two courts reached different results in deciding whether the test was a permissible construction of the FLSA.

In *Mueller*, the Seventh Circuit held the current salary test, i.e., the salary test as modified by the DOL in 1991-92, is valid as applied to the public sector because it is rationally related to the objectives of the FLSA. In so doing, the Seventh Circuit specifically rejected the notion that the current salary test "should have gone further, that is, should have extended the exemption for public employees to the provision on discipline." 54 F.3d at 441-42. On this latter point, the Seventh Circuit noted the DOL had considered but rejected exempting public employers from the salary test's discipline provision. Further, the Seventh Circuit held that "[n]either the principle of public accountability, nor any other principle of public administration . . . makes it imperative that public employers have th[e] power [to discipline by docking pay] with respect to their executive, administrative, and professional employees." *Id.* at 442.

In *SEIU*, the Ninth Circuit concluded the salary test, as it existed prior to September 6, 1991 (the date on which the DOL issued its final interim regulation), is invalid as applied to public sector employers. In reaching this conclusion, the Ninth Circuit noted that, notwithstanding Congress' intent for the executive and administrative exemptions to apply to the public sector, most public employees could not satisfy the salary test as it existed prior to September 6, 1991, because "virtually all" public employers were constrained by pay systems based on public accountability. 60 F.3d at 1352-53. Accordingly, the Ninth Circuit concluded the pre-September 6, 1991, salary test conflicted with congressional intent. Further, the Ninth Circuit concluded that "salvaging" the portions of the salary test that were not affected by public accountability pay systems would be "tantamount to

rulemaking, a power with which [the federal courts] are not invested." *Id.* at 1354. In reaching this latter conclusion, the Ninth Circuit noted the DOL's pre-September 6, 1991, nonenforcement policy "covered the entire salary test, not just part of it; and essentially *no* valid salary test applicable to the public sector existed until the DOL finally conducted rulemaking in 1991 and 1992." *Id.*

We agree with both the Seventh and Ninth Circuits that Congress did not address the question of whether the salary test should apply to the public sector. Accordingly, we proceed to determine whether the salary test, in its pre- and post-September 6, 1991, form, is a permissible construction of the FLSA as applied to the public sector. Beginning first with the current test, we find nothing that would call into question the Seventh Circuit's holding in *Mueller*. To the contrary, we agree the current salary test, as applied to the public sector, is rationally related to the objectives of the FLSA and is valid. We reject the City's challenge to the current salary test.

As for the pre-September 6, 1991, salary test, we are unable to adopt the Ninth Circuit's reasoning in *SEIU*. First, we disagree with the suggestion that all public sector employers are governed by public accountability pay systems and were subject to the DOL's 1987 nonenforcement policy. Although the majority of public sector employers are perhaps governed by such pay systems, the facts of this case clearly demonstrate that all are not. The DOL was obviously aware of this when it adopted its 1987 nonenforcement policy. As the express terms of that policy make clear, only those public sector employers who could demonstrate their pay systems (1) were based upon public accountability laws and/or principles, and (2) were

adopted prior to April 15, 1986, could take advantage of the nonenforcement policy. *See* 57 Fed.Reg. 37,668. We further disagree with the Ninth Circuit's conclusion that the DOL's 1987 nonenforcement policy applied to the entire salary test. Reviewing the relevant portions of the Federal Register outlining the nonenforcement policy, we believe the policy applied only to the portions of the salary test that concerned absences of less than one day due to personal reasons, illness, or accident. *See* 57 Fed. Reg. 37,668; 56 Fed.Reg. 45,824. This conclusion is bolstered by other official DOL statements which indicate that, in the DOL's eyes, the remainder of the salary test remained applicable to all public employers. *See, e.g.*, 57 Fed.Reg. 37,670 (noting interim final rule was published on September 6, 1991, "to allow State and local governments to continue their public-accountability pay systems without incurring liability for overtime pay under FLSA to employees who would otherwise be exempt from the overtime pay requirements."); 56 Fed.Reg. 45,825 (stating "certain aspects" of salary test were "unduly restrictive when applied in the public sector.").

Departing from the Ninth Circuit's position in *SEIU*, we conclude the pre-September 6, 1991, salary test is valid as applied to public sector employers, such as the City, who are not governed by public accountability pay systems. Reviewing the DOL's 1987 nonenforcement policy, it is apparent there was no change whatsoever in the salary test with respect to those public sector employers (however limited the number may have been) who were not governed by public accountability pay systems. With respect to those employers (including the City in this case), we find nothing in the pre-September 6, 1991, salary test that is at odds with Congress' intent

to make available the exemptions for executive, administrative, and professional employees. Like private sector employers, such public sector employers were perfectly capable of structuring their pay systems to comply with all aspects of the DOL's salary test. We reject the City's challenge to the pre-September 6, 1991, salary test.[1]

2. *Did the district court err in concluding public accountability exception of 29 C.F.R. § 541.5d was not applicable in this case?*

The district court found the City had not offered any evidence that its pay system was established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability. The court concluded the public accountability exception of § 541.5d was not applicable, and § 541.5d was not applicable because the City had failed to demonstrate it otherwise met the requirements of the salary test. In particular, the court pointed to the fact that plaintiffs' pay was subject to reduction for absences of less than a day, as well as for court appearances and temporary military leave.

The City argues on appeal that § 541.5d does not require municipalities to prove their pay systems are based upon public accountability principles. We disagree. The DOL, the agency charged with implementing the FLSA, has consistently required public employers to demon-

---

[1] Because the City in this case was not governed by a public accountability pay system, we reach no conclusion concerning the validity of the pre-September 6, 1991, salary test as applied to public sector employers governed by public accountability pay systems.

strate their pay systems are based upon public accountability laws or principles before they can benefit from the DOL's relaxed salary test standards. *See* Fed.Reg. 37,668 (1992). In particular, from early 1987 until September 6, 1991, public employers could only benefit from the DOL's nonenforcement policy if they were able to demonstrate they were governed by a public accountability pay system. Likewise, under the DOL's current regulations, § 541.5d requires a public employer to demonstrate it is governed by a public accountability pay system before it can benefit from that section's "relaxed" salary test standards. *See* 29 C.F.R. § 541.5d. Aside from these indications of DOL's intent, FLSA case law is clear that the employer bears the burden of demonstrating its right to an exemption, *Aaron*, 54 F.3d at 657, and we conclude this burden includes demonstrating that a particular pay system is based upon public accountability laws or principles. To hold otherwise would either place the burden on plaintiffs to demonstrate that a pay system is not based upon public accountability laws or principles, or alternatively grant all public sector employees the right to rely upon § 541.5d. Neither applicable regulations nor relevant case law justifies these results.

After our review of the record, we agree with the district court that the City failed to satisfy its burden of demonstrating its pay system is based upon a public accountability law or principle. In *SEIU*, the Ninth Circuit held that "[p]ublic accountability is the notion that 'governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for expenditure of public funds.' " 60 F.3d at 1352 n. 2 (quoting *Hilbert v. District of Columbia*, 23 F.3d 429, 435 (D.C.Cir. 1994)). Although it is not clear what, if

any, evidence the City presented on this point,[2] on appeal the City claims plaintiffs' salaries are paid from the City's general fund, which in turn is funded by tax revenues, which in turn are required by the Oklahoma Constitution to be levied and collected "for public purposes only." City's br. at 23. This general constitutional provision, and its convoluted link to plaintiffs' salaries, is wholly insufficient to allow us to conclude the City's pay system is based upon a public accountability law as envisioned by the DOL. Moreover, the uncontroverted evidence in this case indicates that salary deductions are discretionary on the part of the City. Because public accountability pay systems *require* an employer to make deductions when an employee is absent from work, the nature of the City's deduction policies makes it obvious that the City is not governed by a public accountability pay system.

There is an additional basis for affirming the district court's decision. Under its express terms, § 541.5d applies only if a public sector employee otherwise satisfies the requirements of the salary test; that is, ignoring deductions that a public sector employer may make for absences of less than one day due to personal reasons, illness, or injury, the employer must otherwise satisfy the test, and therefore cannot make any other deductions from an employee's salary based upon quantity or quality of work. Here, as discussed in greater detail below, it is

---

[2] Plaintiffs allege the City did not present any evidence to the district court on this issue in connection with its motion for summary judgment, but attempted to introduce evidence in connection with its motion to alter judgment after summary judgment was granted in favor of the plaintiffs.

uncontroverted that the City has an express policy of making deductions from plaintiffs' pay for disciplinary infractions. In light of this discipline policy, the City cannot "otherwise meet" the salary test requirements, and therefore cannot rely upon § 541.5d. The district court did not err in denying the City the benefit of § 541.5d.

3. *Did the district court err in concluding plaintiffs were not paid on a salary basis under 29 C.F.R. § 541.118(a), and therefore not exempt from the overtime provisions of the FLSA?*

On appeal, the City argues that, contrary to the conclusions of the district court, it satisfied the "salary" test of 29 C.F.R. § 541.118(a). In support of its argument, the City challenges the court's factual findings on three of the four components of the salary test.

Payment: hourly rate or salary—Plaintiffs each received a predetermined amount of pay based upon where each fell in the City's applicable classification and pay schedule. In addition to this predetermined amount of pay, some plaintiffs occasionally received overtime compensation at a straight-time hourly rate for hours worked when called back to an emergency outside of their regularly scheduled shifts. Six of the named plaintiffs were given compensatory time for working outside their regularly scheduled shifts. It is uncontroverted that the number of hours worked by a plaintiff in a given pay period was printed on his or her pay stub. The court considered these factors and concluded plaintiffs were not salaried employees. The court rejected the City's assertion that overtime pay occasionally granted to plaintiffs fell within the scope of 29 C.F.R. § 541.118(b), which provides that "additional compensation besides the salary is not incon-

sistent with the salary basis of payment." Instead, the court concluded "[t]he payment of an hourly rate to district chiefs, with provision made for the accumulation of overtime, weighs in favor of a finding that Plaintiffs were not salaried employees." Joint append. II at 429.

We disagree with the district court. In *Aaron*, this court rejected the notion that receipt of compensation for overtime hours precludes a finding that an employee is paid on a salary basis. Instead, the court concluded overtime compensation could constitute "additional compensation besides the salary" under 29 C.F.R. § 541.118(b). 54 F.3d at 658. In addition, the *Aaron* court held inclusion on a pay stub of the number of hours covered by a paycheck does not preclude a finding that an employee is paid on a salary basis:

> Since overtime is not inherently inconsistent with one's status as a salaried employee, the fact that the firefighters' paystubs indicated the number of hours covered is also not inconsistent with salaried status. Such an accounting of hours is necessary to compute overtime compensation.

Id.

When the facts pertaining to plaintiffs' pay are reviewed in light of *Aaron*, we conclude plaintiffs received a predetermined salary and were not hourly employees. This factor weighs in favor of the City's claimed exemptions.

Effect of absences from work of less than one day— Although the regulations allow an employer to make deductions when an employee is absent for a day or more for personal reasons, sickness, or disability, without affecting the employee's salaried status, *see* 29 C.F.R. §§ 541.118(a)(2) and (3), an employer is limited in the

deductions it may make when an employee is absent for less than one day. "If the employer docks the employee's pay for an absence of a few hours on a particular day, the implication is that the employee really is expected to work the same number of hours every day, implying in turn that he really is an hourly rather than a salaried worker and that his salaried status is an evasion of the statute." *Mueller*, 54 F.3d at 442.

At least three circuits have held that employees governed by policies penalizing them for absences of less than one day (at least when the penalty involves possible loss of pay) are not salaried employees, and therefore not exempt "executive" employees under 29 C.F.R. § 541.1. *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Martin v. Malcolm Pirnie*, 949 F.2d 611, 617 (2d Cir. 1991), *cert. denied*, 506 U.S. 905, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992); *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068, 111 S.Ct. 785, 112 L.Ed.2d 848 (1991). Other circuits have held such a policy does not preclude exemption unless an employee's pay, as opposed to compensatory leave, is actually docked. *McDonnell v. City of Omaha*, 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163, 114 S.Ct. 1188, 127 L.Ed.2d 538 (1994); *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991); *Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

In *Carpenter v. City & County of Denver*, 82 F.3d 353 (10th Cir. 1996), this court recently joined the first group of circuits, and held the phrase "subject to reduction," as used in 29 C.F.R. § 541.118(a), means "the possibility and not the actuality of a reduction in pay removes an employee from exempt status." *Id.* at 359. The court held,

where an employee is governed by a policy that requires his or her leave time to be reduced for absences, disciplinary infractions, etc., the quality or quantity of the employee's work may ultimately reduce the amount of the predetermined salary received by the employee if the employee's leave time is exhausted. In accordance with *Carpenter*, it is clear that, if an employer's policy concerning absences of less than one day merely creates the possibility of a reduction in pay, the "salary" test is not met with respect to employees subject to that policy.

Here, there is an unwritten City policy that plaintiffs are, and have been at all pertinent times, subject to having their pay reduced for absences of less than a day. Under this unwritten policy, an employee's sick leave, vacation leave, or accumulated compensatory time could be reduced for such absences. However, if an employee does not have sufficient accumulations of sick leave, vacation leave, or compensatory time, his or her pay is subject to being docked. The parties have stipulated that "[e]ach of the [p]laintiffs from time to time has been absent from duty, with approval, for less than one day, and his accumulated vacation leave or compensatory time was reduced on an hour-for-hour basis." Joint append. II at 403. The parties have further stipulated that "[n]o [p]laintiff has suffered any reduction in his regular paycheck as a result of such absences." *Id.*

On appeal, the City argues neither of the stipulations concerning this unwritten policy is "evidence of an express City policy that the District Chiefs' actual pay is subject to reduction." City's br. at 14. The City argues that "[b]oth stipulations were written for the purpose of litigation before the district court, not as policies governing the compensation of City employees, including the

District Chiefs." *Id.* If this argument were accepted, the weight accorded any party's stipulation would be seriously eroded. More important, holding a policy is not "express" unless it is written would allow an employer to adopt a multitude of unwritten policies that fly in the face of the salary test, yet deny the existence of those policies during FLSA litigation. In the end, the City is bound by its stipulations, and we conclude there was an "express" policy that created the possibility of salary reductions for absences of less than one day. We conclude the City's policy concerning absences of less than one day is inconsistent with the salary test.

Jury duty, witness appearances, temporary military leave—An employer may not make deductions from an employee's predetermined salary for jury duty, witness appearances, or temporary military leave without affecting the employee's salaried status. 29 C.F.R. § 541.118(a)(4). An employer may, however, "offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption." *Id.*

Here, § 311 of the City's Personnel Policies and Procedure Manual provides that employees "shall be entitled to no more than twenty (20) working days paid leave per calendar year, travel time inclusive," for military training purposes. Plaintiffs' suppl. append. at 6. With respect to military leave for active duty purposes, the manual provides employees are "entitled to a leave of absence without loss of pay during the first thirty (30) calendar days of such leave." *Id.* Thus, an employee must use alternative leave allowances (i.e., vacation or sick time), be docked pay, or take leave without pay if his or her

military leave exceeds 30 days (if the military leave is for active duty) or 20 days (if the leave is for military training). As for absences due to jury service and/or appearances as a witness, the manual provides leave with pay will be granted "[t]o serve as a juror," or "[t]o testify in court on City-related matters." Plaintiffs' suppl. append. at 7. The manual further provides "[l]eave without pay will be granted to employees for Court appearances which do not meet the above criteria for leave with pay or, at the employee's option, accrued vacation time or compensatory time may be used." *Id.* Although the City now attempts to rely upon provisions of the collective bargaining agreement between the City and plaintiffs' union concerning court and jury leave, there appears to be little variation in how court and jury leave are handled in the collective bargaining agreement versus the manual. The only noticeable difference is the collective bargaining agreement arguably allows an employee to receive leave with pay if he or she is serving as a witness in a non-City-related case in which the employee is not a party. Aside from this difference, both the collective bargaining agreement and the manual indicate an employee's pay will be docked if he or she is absent to appear in a case in which he or she is a party. In such a situation, it appears the employee can choose to use his or her accrued annual leave in lieu of being docked in pay.

The district court found that "[p]laintiffs are subject to reduction in pay for absences due to temporary military leave, after City-paid military leave time has been exhausted." Joint append. II at 434. The court further found that "[a]bsence due to attendance in court as a witness also subjects Plaintiffs to a reduction in pay." *Id.*

The court concluded these findings were "incompatible with Plaintiffs' salaried status." *Id.*

We disagree with the district court's conclusions concerning the City's military leave policy. Notably, the DOL's ban on military leave deductions specifically refers to "temporary military leave," a phrase that is not defined in the regulations. Two federal district courts construing this phrase have suggested that military leaves of absence greater than 15-30 days are not temporary, and that employers may therefore make deductions for longer absences. *Close v. State of New York*, No. 94-CV-0906, 1996 WL 67979 (N.D.N.Y. Feb. 13, 1996); *Quirk v. Baltimore County*, 895 F.Supp. 773, 782 (D.Md.1995). As noted by the *Close* court, National Guard and Reserve service specifically require only 15 and 14 days, respectively, of active duty training each year. 1996 WL 67979 at *6. As further suggested by the *Quirk* court, only a full-scale war would likely require anything beyond this brief period, and would clearly be beyond the scope of "temporary military leave." 895 F.Supp. at 782. We agree with these opinions and conclude the City provides plaintiffs more than enough time to fulfill National Guard and/or Reserve obligations, and any potential deductions for leaves beyond 20 or 30 days would fall outside of § 541.118(a)(4)'s ban on "temporary military leave" deductions.

We also disagree with the district court's conclusion that the City's leave policy concerning jury duty and witness appearances violates § 541.118(a)(4). In *Shockley v. City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993), the court held that an employer need not provide paid leave for an employee to engage in personal litigation. Here, the only time the City does not grant an employee

paid leave is if he or she is appearing, as a party or a witness, in a non-City-related matter. Under *Shockley*, this policy appears to be substantially permissible, the only possible exception being if an employee's pay is reduced for appearance as a witness in a non-City-related matter in which he or she is not a party. We conclude the City's policy concerning absences for jury duty, witness appearances, and temporary military leave is consistent with the salary test.

Docking of pay for disciplinary infractions—In order to maintain an employee's salaried status for FLSA purposes, an employer must limit disciplinary pay deductions to "[p]enalties imposed in good faith for infractions of safety rules of major significance." 29 C.F.R. § 541.118(a)(5). Here, the City stipulated that, "[b]y written City policy, Plaintiffs' pay is, and at all pertinent times was, subject to reduction as a form of discipline, including suspension without pay, imposition of a fine, and demotion." Joint append. II at 403. Further, the court found uncontroverted evidence "that district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance." *Id.* at 434. Based upon this uncontroverted evidence, the district court concluded "the City's disciplinary policy is inimical to its assertion that Plaintiffs are salaried employees." Joint append. II at 434. Significantly, the City has not challenged the court's factual findings on this issue or the court's legal conclusions. Accordingly, it is evident the City's disciplinary policy is inconsistent with the salary test.

Conclusion—The City has failed to satisfy two of the four components of the salary test. Most notably, the City's disciplinary policy violates the salary test because

it allows plaintiffs' pay to be reduced for disciplinary infractions. The City's policy concerning leaves of absence of less than one day also violates the salary test. We conclude the City has not satisfied the salary test and cannot establish its claimed exemptions. We therefore affirm the district court's findings of liability against the City and in favor of plaintiffs.

4. *Did the City save its claimed exemptions under the "window of correction" provided by 29 C.F.R. § 541.118(a)(6)?*

The City argues that, even if it has failed to satisfy the salary test, it is entitled to rely upon the "window of correction" provided by 29 C.F.R. § 541.118(a)(6), which states:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable . . . during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

The initial problem with this argument is that it was not presented by the City to the district court. Issues raised for the first time on appeal will not be reviewed "except for the most manifest error." *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir.), *cert. denied*,

___ U.S. ___, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). Here, the City has not claimed and we do not conclude this issue rises to the level of "manifest error."

Even if we were to consider the City's argument, we find no merit to it. The "window of correction" provided by § 541.118(a)(6) allows employers to treat otherwise eligible employees as salaried, regardless of the employer's one-time or unintentional failure to adhere to § 541.118(a)'s requirements. *Auer v. Robbins*, 65 F.3d 702, 711 (8th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S.Ct. 2545, 135 L.Ed.2d 1066 (1996). However, it is not available if the employer has a settled policy of making improper deductions from compensation. Auer, 65 F.3d at 711. The City has at least one settled policy of making improper deductions from the plaintiffs' compensation (i.e., deductions from pay for disciplinary infractions), and is not entitled to the "window of correction."

5. *Did the City establish its right to a partial exemption under 29 U.S.C. § 207(k)?*

After a nonjury trial on the issue of damages, the district court found the City "failed to sustain its burden of proof under 29 U.S.C. § 207(k) [of establishing a work period greater than 7 days]," and that plaintiffs' "back overtime wages should be calculated under 29 U.S.C. § 207(a)(1), and the applicable work period is a [40-hour] workweek." Joint append. 11 at 453. In its final issue on appeal, the City challenges the court's findings, claiming it "has adopted a nine-day work period of [72] hours to accommodate its fire-fighting employees who work shifts of 24 hours on duty followed by 48 hours off duty." City's br. at 31.

Section 207(a)(1) contains the FLSA's basic provisions concerning payment of overtime wages and requires employers to pay overtime to employees who work more than 40 hours per week. 29 U.S.C. § 207(a)(1). Although a public sector employer with law enforcement or fire protection personnel can choose to conform to the maximum hour and overtime provisions of § 207(a)(1), it may adopt an alternative scheme under § 207(k), which provides a partial exemption from the standard overtime provisions. *Lamon*, 972 F.2d at 1150. Section 207(k) raises the regular rate ceiling and provides:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities . . . if—
>
> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days . . .; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k). Section 207(k)'s "work period concept was intended to ease the overtime burdens of certain public employers by allowing them to average their employees' duty hours over the designated work period, from seven to twenty-eight days in length." *Avery v. City of Talladega*, 24 F.3d 1337, 1344 (11th Cir. 1994).

In regulations accompanying § 207(k), the DOL has established that 212 hours are the maximum number of hours a fire protection employee may work in a work period of 28 days before the employee must be paid an overtime wage. *See* 29 C.F.R. §§ 553.201 and 553.230. For a nine-day work period (as claimed by the City here), the DOL has established that 68 hours are the maximum number of hours a fire protection employee may work before he or she is paid an overtime wage. *Id.* Finally, for the minimum seven-day work period, the DOL has established that 53 hours are the maximum number of hours a fire protection employee may work before he or she is paid an overtime wage. *Id.*

A public sector employer bears the burden of establishing that it qualifies for a § 207(k) exemption. *Barefield v. Village of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996). To qualify for the exemption, the employer must establish the employees in question have a work period of at least seven, but not more than twenty-eight, consecutive days. *See Avery*, 24 F.3d at 1343. This is normally a question of fact, *Barefield*, 81 F.3d at 710, governed by a preponderance of evidence standard. *Lamon*, 972 F.2d at 1154.

"The 'establishment' of a 7(k) work period may be manifested by an appropriate public declaration of intent to adopt a work period of between 7 and 28 days." *McGrath v. City of Philadelphia*, 864 F.Supp. 466, 476 (E.D. Pa. 1994) (citing *Lamon*, 972 F.2d at 1154). "Alterna-

tively, a public employer may establish a 7(k) work period even without making a public declaration, as long as its employees actually work a regularly recurring cycle of between 7 and 28 days." *Id.* (citing *Birdwell v. City of Gadsden*, 970 F.2d 802, 806 (11th Cir. 1992)).

Reviewing the record on appeal, we are unable to conclude the district court's factual findings on this issue are clearly erroneous. The joint appendix, which was filed by the City, includes only 7 of approximately 112 pages from the damage hearing transcript. The only reference in these 7 pages to the work period issue is a colloquy between the district court and the City's counsel in which counsel argues the City "did not have to establish such a [work] period for what we considered in good faith [to be] exempt employees." Joint append. at 448. Also included in the record on appeal is plaintiffs' supplemental appendix which contains approximately 20 additional pages from the damage hearing transcript. Included therein is the testimony of the City's employee relations manager, who essentially admitted the City had not established a work period for the District Fire Chiefs. Although the City now argues it established a nine-day work period for plaintiffs via certain provisions of the collective bargaining agreement, there is simply no indication in the record on appeal that the City made this argument in its memoranda of law or at the time of the damage hearing. Because the evidence in the record on appeal pertaining to the work period issue supports the factual findings of the district court, we conclude the court did not err in rejecting the City's claimed exemption under § 207(k).

IV.

The judgment of the district court is AFFIRMED.

APPENDIX B

[Dated January 26, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

B. N. SPRADLING, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 92-C-414-E
	)	
	)	
THE CITY OF TULSA,	)	
	)	
Defendant.	)	

ORDER

The Court has before it for consideration Plaintiffs' Motion for Partial Summary Judgment (Docket #50) and Defendant's Motion for Summary Judgment (Docket #52). Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). Summary judgment cannot be awarded when there exists a genuine issue as to a material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970).

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court stated that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden at trial." *Id.* at 322, 106 S.Ct. at 2552. The moving party, of course, must shoulder "the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which [it] believes demonstrate the absence of a genuine issue of fact." *Id.* at 323, 106 S.Ct. at 2553.

Plaintiffs contend they worked 52 hour weeks for a period of 3 years in the capacity of District Fire Chiefs for the City of Tulsa ("Defendant"). Plaintiffs claim they are "employees" under the Fair Labor Standards Act ("FLSA") and are entitled to compensation under 29 U.S.C. § 207 for: (1) overtime work; and (2) time spent attending training sessions and staff meetings.

On November 21, 1994, the parties waived jury trial in this action, and jointly requested that the Court determine the issue of FLSA exemption as a matter of law. The Court has reviewed the pleadings and filings in this action, and finds, construing the pleadings liberally in favor of the party opposing summary judgment and considering all factual inferences tending to show triable issues, that material issues of fact do not remain to be litigated.

I. The Salary Test.

The Department of Labor (DOL) has promulgated various regulations interpreting the FLSA. The administrative regulations adopted pursuant to the FLSA are entitled to great weight and the court may properly resort to them for guidance. *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145, 1151 n. 7 (10th Cir. 1992), *cert. denied*,

___ U.S. ___, 113 S.Ct. 1414 (1993); see also *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-845, 104 S.Ct. 2778, 2781-83 (1984) (discussing deference to be given an administrative agency's construction of the statute which it administers).

The City characterizes Plaintiffs as exempt salaried employees within the scope of 29 C.F.R. § 541.118(a). The parties have stipulated that "Plaintiffs meet all criteria for both the 'administrative' and 'executive' exemptions from FLSA except the salary basis test which is the remaining dispute between the parties." Stipulation #1. Thus, the Court must determine if application of the salary test defeats Defendant's classification of Plaintiffs as exempt salaried employees.

The salary test is set forth at 29 C.F.R. § 541.118. It provides that an employee is not paid on a salary basis if any of the following policies are present:

1) An employee's compensation is based on an hourly rate. *Service Employee Intern. Union Local 102 v. County of San Diego*, 35 F.3d 483, 489 (9th Cir. 1994).

2) An employee's absence for less than a day subjects the employee to a possible deduction from his pay or a possible reduction in accumulated sick leave or vacation time. *Id.*

3) An employee is subject to disciplinary suspensions without pay for reasons other than major safety violations. *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279, 286 (7th Cir. 1993).

4) An employee's salary is subject to deductions because of absences caused by jury duty, attendance as a witness, or temporary military leave. 29 C.F.R. § 541.118(a)(4).

1. *Hourly Rate.* Plaintiffs argue that their pay has been predicated on an hourly rate, not on a salary basis. In support, Plaintiffs offer as exhibits a pay stub from each of three district chiefs. The pay stubs indicate that Plaintiffs' compensation was based on the number of hours they worked. Plaintiffs' Exhibits #5-A, 5-B, and 12. Defendant argues that plaintiffs were paid a predetermined amount each pay period, regardless of the number of hours worked.

The itemized pay stub that is Exhibit #12 demonstrates that regular earnings of district chiefs can be supplemented with overtime hours. Payment is made on an hour-for-hour basis according to hours worked. Overtime payments to district chiefs and other FLSA-exempt personnel are specifically provided for by the City. Section 214.31 of the City of Tulsa Policies and Procedures Manual states, "[Exempt] employees . . . shall be compensated for scheduled work over forty (40) hours in one week at straight-time rates or they shall be granted equal compensatory time off." Plaintiff's Exhibit #3.

Contemplating a similar overtime scheme, a Virginia district court considered the fact that fire lieutenants' pay was calculated by multiplying the time on the pay stub by the hourly rate. *Thomas v. County of Fairfax. Va.*, 758 F.Supp. 353, 364-65 (E.D. Va. 1991). The court also noted that lieutenants received additional compensation at an hourly rate for the hours worked beyond the regular schedule. *Id.*

A Kansas case filed by current and former fire fighters involved facts which showed:

> . . . plaintiffs received additional compensation, i.e., 'premium pay,' for overtime hours and holidays which

> they worked outside of their regularly scheduled hours of duty. Such additional compensation for extra hours worked is not generally consistent with salaried status.

Aaron v. City of Wichita, Kan., 797 F.Supp. 898, 907 (D. Kan. 1992).

"The evidence establishes," wrote an Arizona court, "that DPS pays its exempt employees either comp time or additional time on an hour-for-hour basis for hours worked in excess of their scheduled work week." *Wertheim v. State of Arizona*, 1993 WL 603551, *11 (D. Ariz. 1993). The court found this policy incompatible with the general rule that "salaried employees should not receive additional compensation for working overtime hours." *Id.*

Defendant contests the holdings of these courts, stating that they are contrary to 29 C.F.R. § 541.118(b), which states in part, "additional compensation besides the salary is not inconsistent with the salary basis of payment." A district court explicitly relied on this section in finding that the additional payment of overtime at an hourly rate "will not defeat the administrative exemption because it is expressly permitted by the labor regulations. *See* 29 C.F.R. 541.118(b)." *International Ass'n. of Fire Fighters, Alexandria Local 2141 v. City of Alexandria*, 720 F.Supp. 1230, 1232 (E.D. Va. 1989); *aff'd.*, 912 F.2d 463 (4th Cir. 1990).

The same district court judge (Hilton, J.) reached the same finding for the same reason in a similar case only four months earlier. *Hartman v. Arlington County*, 720 F.Supp. 1227 (E.D. Va. 1989); *aff'd.*, 903 F.2d 290 (4th Cir. 1990). The Fifth Circuit cited Judge Hilton's reasoning in *York v. City of Wichita Falls, Tex.*, 944 F.2d 236

(5th Cir. 1991): "[p]aying an hourly rate for each hour worked beyond the regular schedule does not defeat the executive exemption." *Id.* at 242.

Another Virginia court reviewed the reasoning of *Hartman* and *Fire Fighters Local 2141*, and found their reliance on § 541.118(b) "misplaced." *Thomas*, 758 F.Supp. at 365. The court explained:

> [The section] nowhere mentions "overtime," which is specifically treated in 29 C.F.R. § 778 *et seq*. Consequently, § 541.118(b) does not "expressly permit" overtime payments to salaried employees. In addition, § 541.118(b) does not approve additional compensation *computed by means of an hourly rate*; in fact, none of the examples cited in the regulation is explained in terms of hourly rates.

Id. (emphasis in original).

The Court finds the *Thomas* reasoning compelling. The Court agrees that "the concept of 'overtime' pay is inherently inconsistent with the common-sense understanding of salaried executive status." *Id.* at 364-65. The payment of an hourly rate to district chiefs, with provision made for the accumulation of overtime, weighs in favor of a finding that Plaintiffs are not salaried employees.

2. *Absence of Less than a Day Counted as Deduction in Pay or Against Accrued Sick Leave.* The parties have stipulated that "Plaintiffs are, and have been at all pertinent times, subject to having their pay reduced for absences of less than a day." Stipulation #2. Absences of less than a day by salaried employees are dealt with by the City in the following manner:

> If (Plaintiffs) have sick leave, vacation leave, or compensatory time accumulated, those could be reduced to account for the absence; if they do not have sufficient accumulations of the above, then Plaintiff's pay is subject to being docked; if they do not have sufficient accumulations of the above, Plaintiff's pay is subject to reduction for court appearances, other than as a juror, for matters that are not City-related.

Stipulation #2.

The stipulation recognizes that no Plaintiff has actually had his pay reduced as the result of any absence of less than a day. The stipulation also describes how, on one occasion, a Plaintiff testified as a witness in a matter unrelated to the City, and his absence of less than a day was deducted from his vacation time on an hour-for-hour basis.

Other courts have held that an employer cannot establish its employees to be exempt where their compensation was subject to reduction for absences when their leave time was exhausted. *See Fleming v. Carpenters/ Contractors Cooperation Committee, Inc.*, 834 F.Supp. 323, 326 (S.D. Cal.1993); *Hawks v. City of Newport News*, 707 F.Supp. 212, 214-215 (E.D. Va. 1988); *Persons v. City of Gresham, Or.*, 704 F.Supp. 191, 194 (D. Or. 1988); *Knecht v. City of Redwood City*, 683 F.Supp. 1307, 1311 (N.D. Cal. 1987).

The City argues that deductions from pay as a result of an absence of less than a day are merely theoretical; since no Plaintiff has ever suffered such a reduction, Plaintiffs' pay is not actually "subject to reduction" within the meaning of 29 C.F.R. § 541.118(a). In support of its interpretation of the phrase "subject to reduction," the City cites *McDonnell v. City of Omaha, Neb.*, 999

F.2d 293 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 1188 (1994). In that case, deductions from pay for absences of less than a day were permitted under city policy, but no deduction had ever been made. The *McDonnell* court found that the city policy only created a "possible" or "contingent" possibility of an employee's pay being reduced, and refused to find that a possibility of reduction was within the scope of the phrase "subject to reduction." *Id.* at 297. Other decisions with similar holdings are cited from the Fifth and Eleventh Circuits.[1] Defendant's Motion for Summary Judgment at 4-6.

A contrary interpretation of "subject to reduction" has been announced by the Second, Fourth, Sixth, Seventh, Ninth, and D.C. circuits.[2] In *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993), the court stated:

> The language of the governing Department regulations focuses on whether the employees' pay can be docked, not whether it actually has been docked . . . Employees paid under a system that subjects them, even theoretically, to docking for absences by the hour lack one of the characteristics explicitly identified in the Department's regulation on salaried pay.

---

[1] *York v. City of Wichita Falls*, 944 F.2d 236 (5th Cir. 1991); *Atlanta Professional Firefighters Union*, 920 F.2d 800 (11th Cir. 1991).

[2] *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 298 (1992); *Klein v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 990 F.2d 279 (7th Cir. 1993); *Michigan Ass'n of Governmental Employees v. Michigan Dept. of Corrections*, 992 F.2d 82 (6th Cir. 1993); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993); *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993); *Hurley v. State of Oregon*, 27 F.3d 392 (9th Cir. 1994).

Id. at 11. The Court finds this interpretation to be correct, as it is consistent with the plain meaning of the regulation. This interpretation is further supported by DOL's representations:

> In its promulgation of § 541.5(d), the DOL declined the suggestion of one commentator to "alter[ ] the regulations to require that an actual deduction of pay occur before the exemption is lost." 57 Fed.Reg. 37672. The DOL expressly found that requiring an actual deduction was inconsistent with the appropriate focus upon the pay system at issue. 57 Fed.Reg. 37673.

Yourman v. Dinkins, 826 F.Supp. 736, 743 (S.D.N.Y. 1993). This Court's interpretation of "subject to reduction" is confirmed by the Seventh Circuit:

> Subject to reduction does not mean that a reduction was actually made. The plain meaning of the language suggests that it is enough that a deduction could have been made for an impermissible reason.

Klein, 990 F.2d at 286.

Defendant proposes that 29 C.F.R. § 541.5(d) "resolves any inconsistency that existed between a public employer's constraints and § 541.118." Defendant's Motion for Summary Judgment at 7. Section 541.5(d), which became a final regulation on August 19, 1992, created a public accountability exception. Essentially, the section provides that public agencies which utilize a pay system established pursuant to principles of public accountability can reduce an employee's pay when an employee is absent for less than a day, without jeopardizing the employee's administrative, executive, or professional exemption.

"The 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability." *SEIU, Local 102*, 35 F.3d at 489. In a case where the defendant was qualified to invoke the special provisions of § 541.5(d), a district court wrote, "[i]n view of § 541.5(d) . . . the Court does not rely upon defendants' part-day docking of pay in order to disqualify plaintiffs from the exemption." *Yourman*, 826 F.Supp at 741.

Defendant has not offered any evidence that the City of Tulsa's pay system was established "by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability." 29 C.F.R. § 541.5(d). Furthermore, § 541.5(d) begins with the caveat, "[a]n employee of a public agency who otherwise meets the requirements of § 541.118 . . ." Defendant must prove that it otherwise meets the requirements of § 541.118 before it can claim the exemption provided by this special provision. The Court has found, *supra*, that Plaintiffs' pay is subject to reduction for absences of less than a day. Additionally, the Court has found, *infra*, that Plaintiffs' pay is subject to reduction for court appearances as a witness or for temporary military leave. Therefore, Defendant does not satisfy the requirements of § 541.118, and is thus not entitled to invoke § 541.5(d).

3. *Disciplinary Suspensions Without Pay*. The City notes that 29 C.F.R. § 541.118(a)(5) permits an employer to reduce a salaried employee's pay as a form of discipline for infractions of safety rules of major significance. Plaintiffs and Defendant agree that, under written City policy, district chiefs can be disciplined by reductions in

pay for reasons *other* than infractions of safety rules of major significance. Stipulation #4.[3]

Plaintiffs have offered uncontroverted evidence that district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance. Plaintiffs' Exhibits #17, 18A, 18B. When subjected to analysis under § 541.118(a)(5), the Court finds that the City's disciplinary policy is inimical to its assertion that Plaintiffs are salaried employees.

4. *Reduction for Jury Duty, Attendance as a Witness, or Temporary Military Leave.* Plaintiffs are subject to reduction in pay for absences due to temporary military leave, after City-paid military leave time has been exhausted. Plaintiff's Exhibit #3, § 311. Absence due to attendance in court as a witness also subjects Plaintiffs to a reduction in pay. Plaintiff's Exhibit #3, § 312, and Stipulation #2. These facts are incompatible with Plaintiffs' salaried status. "Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave." 29 C.F.R. § 548.118(a)(4). Other courts have held that facts similar to Plaintiffs' are contrary to § 548.118(a)(4):

> The manifest discrepancies between the defendants' time and leave regulations and the DOL's definition of salary "basis" in regard to penalties and absences for attendance at court proceedings or due to military

---

[3] Plaintiff's Exhibit #3, taken from § 411 of the City of Tulsa Policy and Procedures Manual, discloses that there are at least 45 separate kinds of misconduct which will subject an employee to suspension without pay or demotion.

leave prevent defendants from meeting their burden regarding the exemption under § 213(a)(1).

Yourman, 826 F.Supp. at 739; *see also Shockley v. City of Newport News*, 997 F.2d 18, 24 (4th Cir. 1993); *Fleming*, 834 F.Supp. at 326. The City's policy on service as a witness and temporary military leave precludes a finding that Plaintiffs are salaried employees.

Application of the salary test to the district chiefs reveals that they do not receive a salary. Defendants must prevail on all four elements of the salary test. Defendants have not carried their burden of proof. Application of the salary test to Plaintiffs compels the finding that they are not salaried employees. This finding is not yet dispositive, however, because Defendant has objected to the legitimacy of the salary test itself.

II. Objections to the Salary Test

Defendant proposes that the salary test is inapplicable to public employers. Defendant bases this contention on its belief that application of the salary test to public employers is contrary to the intent of Congress. Defendant states that Congress amended the FLSA to accommodate public employers. As part of that accommodation, Defendant believes that employees of public entities should not lose their § 213(a)(1) exempt status when their pay is subject to reduction for absences of less than a day. Without this regulatory protection, Defendant appears to argue that Congress' efforts to make the FLSA accommodating of public employers have been stymied. For that reason, Defendant asks the Court to find that the salary basis test is invalid as applied to public employers. Defendant concludes that the regula-

tion is invalid because it is contrary to the FLSA and congressional intent. The City's argument was the position of the defendant in *SEIU, Local 102*, 35 F.3d at 486-489.

In that case, the court stated:

> We therefore conclude that the salary test, 29 C.F.R. § 541.118(a), as it existed before the DOL suspended its application to public employers on September 6, 1991, was invalid in its entirety as it applied to the public sector . . . It is not possible to salvage parts of it given its basic infirmity. Thus, through September 6, 1991, for public sector employees to qualify for the executive and administrative exception to the FLSA, they need only have satisfied the duties test.

Id. at 489. The Court finds Defendant's argument, and the reasoning of the Ninth Circuit, unpersuasive. In its decision, the *SEIU* court's repudiation of the salary test marked the first determination by an appellate court that the salary test "conflicted with congressional intent that public sector employers be able to claim the administrative and executive exception." *Id.* at 488, 89. That court's only citation to precedent for its finding is one appellate judge's partial dissent and one district court opinion. The citation is entombed in a footnote:

> Although this Circuit has not previously considered this argument some judges have found it convincing. *See, e.g., Hilbert (v. District of Columbia)*, 23 F.3d (429) at 435 (D.C. Cir. 1994) (Henderson, J., concurring in part, dissenting in part); *Stewart v. City & County of San Francisco*, 834 F.Supp. 1233, 1235-38 (N.D. Cal. 1993).

SEIU, Local 102, 35 F.3d at 489, n. 4.

SEIU was recently decided (October 5, 1994). No other circuits have, as of yet, followed its reasoning on this issue.[4] A district court in New York described *SEIU* as "an intervening change in the applicable law." *Feaser v. City of New York*, 1994 WL 681631, *2 (S.D.N.Y. 1994). The court qualified its description when it determined that "it would be premature to hold at this juncture that the salary basis test is inapplicable to public employees. Nothing indicates that the salary basis test has lost its vitality or that it should not be applied to the public employers in this circuit." *Id.*

The courts in *SEIU* and *Stewart* reviewed the legislative history of the FLSA, compared that with the regulations issued by DOL concerning the salary basis test, and determined that the regulations were contrary to congressional intent. The two courts found that application of the regulations to the public sector defendants would violate the principles of *Chevron*.

In this case, Defendant has not provided any direct evidence of congressional intent. Defendant has not offered evidence that the City of Tulsa has adopted an ordinance or policy requiring that employees be paid subject to the principles of public accountability.[5] Without

---

[4] *But see Mueller v. Thompson*, 858 F.Supp. 885 (W.D. Wis. 1994). The district court found § 541.118(a)(5) invalid as applied to public sector employers "because it does not comport with congressional intent to afford public sector employers the same opportunities for FLSA exemptions as private sector employers." *Id.* at 899.

[5] *See, e.g., Stewart v. City and County of San Francisco*, 834 F.Supp. 1233 (N.D. Cal. 1993) ("The city is prohibited by the city charter from paying any employee for hours not worked. San Francisco Charter § 8.400(g)"). *Id.* at 1240.

such evidence, the Court cannot find that a DOL regulation is invalid as contrary to the intent of Congress, as expressed in the FLSA. This result is in accord with the decisions of other courts which have considered arguments similar to Defendant's. *See Paulitz v. City of Naperville*, 781 F.Supp. 1368 (N.D. Ill. 1992) and *Yourman*. This Court is neither bound nor convinced by the Ninth Circuit's evaluation of congressional intent in regards to the salary test. Therefore, the Court declines to adopt *SEIU*'s conclusion that the salary test, as it existed prior to September 6, 1991, cannot be applied to public sector employees.

Defendant protests that DOL's regulations "relative to discipline are arbitrary and capricious," especially when applied to public employers. Defendant's Response to Plaintiff's Motion for Summary Judgment at 10. Whether 29 C.F.R. § 541.118(a)(5) is arbitrary and capricious is a question that is not before this Court. Defendant posits that "the failure to acknowledge the difference between public and private employers is not new to the DOL." Defendant's Response to Plaintiffs' Motion for Summary Judgment at 11. This statement carries the implication that 29 C.F.R. § 541.118(a)(5) is another such failure.

Defendant cites numerous hypotheticals in which the regulation would pose a burden on the city, *e.g.*, the prospective inability of the City to reduce the pay of a firefighter who sold drugs while on duty. This position focuses exclusively on reduction in pay as a form of discipline. The City of Tulsa's concern was raised by the City of Talladega in *Avery v. City of Talladega, Ala.*, 24 F.3d 1337 (11th Cir. 1994). The *Avery* court held that "the F.L.S.A. regulations are not written to help promote discipline and public safety." *Id.* at 1341. It is inconceiv-

able to the Court that a reduction in pay is the only form of discipline which the City can impose on miscreant firefighters.

III. The Burden of Proof

The City urges that Plaintiffs are subject to the FLSA exemption for administrative or executive employees. Defendant carries the burden of proof: "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 2229 (1974).

The City agrees that it carries the burden of proof for its affirmative defense, but states that the ordinary standard for civil suits, preponderance of the evidence, applies. Plaintiffs suggest that an evidentiary standard greater than preponderance of the evidence applies. *See Reich v. State of Wyo.*, 993 F.2d 739, 741 (10th Cir. 1993) (exemptions to the FLSA are to be narrowly construed; the employer must show the employees fit plainly and unmistakable within the exemption's terms); *Lamon*, 972 F.2d at 1153 "[a]n employer who asserts he is exempt from the [FLSA] 'has the burden of establishing the exemption affirmatively and clearly' ") (*citing Schoenhals v. Cockrum*, 647 F.2d 1080, 1081 (10th Cir. 1981) (*citing Legg v. Rock Products Manufacturing Corp.*, 309 F.2d 172, 174 (10th Cir. 1962); *Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984) (employer who asserts exemption under § 213(a)(i) must satisfy applicable requirements by "clear and affirmative evidence"). Furthermore, exemptions to the FLSA must be narrowly construed against the employer and limited to those cases

that fall "plainly and unmistakably within the terms and the spirit of the exemption invoked." *Schoenhals*, 647 F.2d at 1081.

Plaintiffs have construed the courts' discussions of the burden of proof, *supra*, as mandating the application of an evidentiary standard such as "clear and convincing evidence" or "clear and affirmative evidence." Plaintiff's Trial Brief at 6. Defendant opposes Plaintiffs' characterization of Defendant's burden of proof, in that "Plaintiffs cite absolutely no authority that indicates the City's standard is more than the usual preponderance of the evidence." Defendant's Trial Brief at 5; Defendant's Brief in Response to Plaintiff's Motion for Summary Judgment at 2. Defendant's rebuttal includes general citation to three cases: *Dickenson v. U.S.*, 353 F.2d 389 (9th Cir. 1966), *cert. denied*, 384 U.S. 908, 86 S.Ct. 1345 (1966); *Brennan v. Parnham*, 366 F.Supp. 1014 (D.C. Pa. 1973); and *Wirtz v. Southern Pickery, Inc.*, 278 F.Supp. 729 (W.D. Tenn. 1968). Because Plaintiffs prevail under either standard of proof, the Court refrains from deciding this issue.

IV. Conclusion

The Court has applied the salary test to Plaintiffs and finds that Defendant has not sustained its burden of proof as to its contention that Plaintiffs are paid on a salary basis. Because the Plaintiffs are not paid on a salary basis, they are not exempt from the FLSA as either executive or administrative employees. Therefore, Plaintiffs are entitled to receive overtime compensation in accordance with the FLSA.

At this time, there is no evidence before the Court to indicate whether or not the City's violation of the FLSA can be characterized as willful, as discussed in 29 U.S.C. § 255(a) (statute of limitations extended from two years to three for willful violations) and 29 U.S.C. § 216(b) (employers who violate § 207 of the FLSA shall be liable for unpaid compensation, unpaid overtime compensation and an additional equal amount in liquidated damages if the violation is deemed willful.) The Court will schedule a non-jury trial on the issues of willfulness and liquidated damages.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Docket #50) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Docket #52) is DENIED.

SO ORDERED on this 26th day of January, 1995.

/s/ JAMES O. ELLISON
JAMES O. ELLISON
UNITED STATES DISTRICT COURT

APPENDIX C

29 U.S.C. § 213 Exemptions.

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities) . . .

29 C.F.R. § 541.1 Executive.

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customary recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to

the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.2 Administrative.

The term *employee employed in a bona fide * * * administrative * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) (1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week

($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.3 Professional.

The term *employee employed in a bona fide * * * professional capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(2) Work that is original and creative in character in a recognized field or artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or

(3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed, or

(4) Work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in §541.303; and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for services on a salary or fee basis at a rate of not less than $170 per week ($150 per

week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That this paragraph shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof, nor in the case of an employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of medicine or any of its branches, nor in the case of an employee employed and engaged as a teacher as provided in paragraph (a)(3) of this section: *Provided further*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance either of work described in paragraph (a)(1), (3), or (4) of this section, which includes work requiring the consistent exercise of discretion and judgment, or of work requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section: *Provided further*, That the salary or fee requirements of this paragraph shall not apply to an employee engaged in computer-related work within the scope of paragraph (a)(4) of this section and who is compensated on an hourly basis at a rate in excess of 6½ times the minimum wage provided by section 6 of the Act.

29 C.F.R. § 541.118 Salary basis.

(a) An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives

each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.

(1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

(2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. Thus, if the employer's particular plan, policy or practice provides compensation for such absences, deductions for absences of a day or longer because of sickness or disability may be made before an employee has qualified under such plan, policy or practice, and after he has

exhausted his leave allowance thereunder. It is not required that the employee be paid any portion of his salary for such day or days for which he receives compensation for leave under such plan, policy or practice. Similarly, if the employer operates under a State sickness and disability insurance law, or a private sickness and disability insurance plan, deductions may be made for absences of a working day or longer if benefits are provided in accordance with the particular law or plan. In the case of an industrial accident, the "salary basis" requirement will be met if the employee is compensated for loss of salary in accordance with the applicable compensation law or the plan adopted by the employer also has some plan, policy or practice of providing compensation for sickness and disability other than that relating to industrial accidents.

(4) Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week without loss of the exemption.

(5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

(6) The effect of making such a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case

the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

(b) *Minimum guarantee plus extras.* It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee's compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $155 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment on a "salary basis." For example, a salary of $200 in each week which any work is performed, and an additional $50 which is made subject to deductions which, are not permitted under paragraph (a) of this section.

(c) *Initial and terminal weeks.* Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

29 C.F.R. § 541.5d Special provisions applicable to employees of public agencies.

(a) An employee of a public agency who otherwise meets the requirements of § 541.118 shall not be disqualified from exemption under §§ 541.1, 541.2, or 541.3 on the basis that such employee is paid according to a pay system established by a statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because—

(1) permission for its use has been sought or has been sought and denied;

(2) accrued leave has not been exhausted; or

(3) the employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid 'on a salary basis' except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

APPENDIX D

[Dated November 23, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

B.N. SPRADLING, B.C. DOW, J.D. FELLINGER, L.M. LAMB, ROBERT L. McCLARY, PHILIP, MORGANS, EDGAR LEON WILSON, F.L. COOK, D.R. GRANT, E.L. SIMPSON, THOMAS E. HOLLAND, ROBERT E. NANTZ, BILLY JOE GEIER, KEN LORTON, and BILLY J. RICHARDSON,	)	
Plaintiffs,	)	
vs.	)	Case No. 92-C-414-E
THE CITY OF TULSA, OKLAHOMA, a municipal corporation,	)	
Defendant.	)	

STIPULATIONS

The following stipulations currently apply, and at all pertinent times applied, to the rank of District Chief (FD 05):

1. The Plaintiffs meet all criteria for both the "administrative" and "executive" exemptions from FLSA except the salary basis test which is the remaining dispute between the parties.

2. By unwritten City policy, Plaintiffs are, and have been at all pertinent times, subject to having their pay reduced for absences of less than a day:

- if they have sick leave, or compensatory time accumulated, those could be reduced to account for the absence;

- if they do not have sufficient accumulations of the above, then Plaintiffs' pay is subject to being docked;

- if they do not have sufficient accumulations of the above, Plaintiffs' pay is subject to reduction for court appearances, other than as a juror, for matters that are not City-related.

3. Each of the Plaintiffs from time to time has been absent from duty, with approval, for less than one day, and his accumulated vacation leave or compensatory time was reduced on an hour-for-hour basis. No Plaintiff has suffered any reduction in his regular paycheck as a result of such absences. On at least one occasion after he became a District Chief, Plaintiff Ken Lorton was absent from duty, with approval, for less than one day for the purpose of testifying in his adult son's child-custody case. Such absence resulted in the reduction of Plaintiff Lorton's accumulated vacation leave on an hour-for-hour basis, and he received no witness-fee or other compensation for his time in court.

4. By written City policy, Plaintiffs' pay is, and at all pertinent times was, subject to reduction as a form of discipline, including suspension without pay, imposition of a fine, and demotion.

5. No such reductions have occurred to any of the Plaintiffs. In 1982, the City of Tulsa did suspend without pay District Fire Chief B.J. Reeves (now retired) as discipline for failure to attend a meeting.

6. Plaintiffs' Exhibit No. 3, is, and at all pertinent times has been, applicable to all Plaintiffs.

7. Plaintiffs Cook, Geier, Grant, Simpson, Lorton, and Richardson have been given compensatory time for having worked outside their regularly scheduled shifts.

8. Per the Collective Bargaining Agreements, some Plaintiffs have, on occasion, received overtime compensation at a straight-time hourly rate for hours worked when called back to an emergency outside their regularly scheduled shifts. Plaintiffs' Exhibit 12 is an example.

9. Plaintiffs' Exhibits 5A and 5B are true copies of the final pay check/pay stub for Plaintiffs Simpson and Richardson on their respective retirement dates (all other Plaintiffs are still active employees of the City.

10. All Stipulations set forth in the Agreed Final Pre-Trial Order, except Stipulation Nos. 15 and 19, are incorporated by reference.

11. Plaintiffs are, and at all pertinent times have been, required to be at their post and ready for duty at 0800 hours (8:00 a.m.) for each regularly-assigned tour of duty, and unless authorized to be absent, are required to be on-duty continuously until 0800 hours (8:00 a.m.) on the following day.

12. Plaintiffs are, and at all pertinent times have been, required to keep accurate records of their attendance at work, including the recordation of absences and part-day absences, and required to submit these records to the office of the Fire Chief on a weekly basis.

13. Each Plaintiff is, and at all pertinent times has been, compensated at a rate exceeding $250.00 per week.

14. In addition to the above stipulations, the court may consider exhibits submitted herewith.

Actual damages, liquidated damages, and wilfulness are outstanding issues. If the Court grants Plaintiffs' motion, the parties waive a jury trial on those issues. If actual damages are considered, the parties anticipate the amount for each Plaintiff will not be disputed. If the Court grants the Defendant's motion, those issues are moot at the district court level.

The parties agree this matter, the issue of exemption, should be decided as a matter of law.

November 23, 1994

/s/ Mark W. Schilling
Mark Schilling,
Attorney for Plaintiffs

/s/ Charles A. Fisher
Charles Fisher,
Attorney for Defendant

APPENDIX E

AFFIDAVIT OF PLAINTIFF KEN LORTON

COMES NOW Ken Lorton, being of legal age and being first duly sworn upon his oath, and hereby states the following:

1. My name is Ken Lorton. I am a Plaintiff in the district Chiefs' FLSA overtime suit pending in Tulsa Federal Court.

2. Subsequent to my promotion to the rank of District Fire Chief, my adult son became a party to child-custody proceedings. To the best of my memory, on at least one occasion I appeared with him in Court to testify as a witness on his behalf.

3. On that occasion, I was regularly scheduled to work a 24-hour tour of duty with the Tulsa Fire Department. I knew that if I were to take off the time necessary to appear as a witness for my son, it would be necessary to account for this lost time by charging it against paid leave which I had earned. When I appeared in Court, I was absent from work for less than a full shift, and the hours which I was absent were charged against my accrued vacation leave, which was reduced on an hour-for-hour basis. I received no witness-fee or other compensation for my time in court.

/s/ Ken Lorton
Ken Lorton

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

Subscribed and sworn to before me this 22nd day of November, 1994.

/s/
Notary Public

My Commission Expires:

7-22-97

[S E A L]

AFFIDAVIT OF STANLEY HAWKINS

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

Prior to 1986, I, Stanley Hawkins, while Tulsa Fire Chief, fined District Chief Bill Burgess for violation of a Fire Department rule not related to safety.

FURTHER AFFIANT SAITH NOT.

/s/ Stanley Hawkins
Stanley Hawkins

ACKNOWLEDGMENT

Before me, the undersigned, a Notary Public in and for said County and State on this 23rd day of November, 1994, personally appeared Stanley Hawkins, to me known to be the identical person who subscribed his signature to the foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above set forth.

/s/
Notary Public

My Commission Expires:

June 15, 1997

AFFIDAVIT OF STANLEY HAWKINS

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

Prior to 1986, I, Stanley Hawkins, while Tulsa Fire Chief, suspended District Chief Billy Joe Reeves without pay for transporting unauthorized persons in a Fire Department vehicle.

FURTHER AFFIANT SAITH NOT.

/s/ Stanley Hawkins
Stanley Hawkins

ACKNOWLEDGMENT

Before me, the undersigned, a Notary Public in and for said County and State on this 23rd day of November, 1994, personally appeared Stanley Hawkins, to me known to be the identical person who subscribed his signature to the foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal the day and year last above set forth.

/s/
Notary Public

My Commission Expires:

June 15, 1997

(2)

No. 96-905

Supreme Court, U.S.
FILED
JAN 6 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

THE CITY OF TULSA, OKLAHOMA, a Municipal Corporation,

Petitioner,

vs.

B.N. SPRADLING, B.C. DOW, J.D. FELLINGER, L.M. LAMB, ROBERT L. McCLARY, PHILLIP MORGANS, EDGAR LEON WILSON, F.L. COOK, D.R. GRANT, E.L. SIMPSON, THOMAS E. HOLLAND, ROBERT E. NANTZ, BILLY JOE GEIER, KEN LORTON, and BILLY J. RICHARDSON,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT A. NANCE
Counsel of Record
DONALD M. BINGHAM
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS
Attorneys for Respondents
502 West Sixth Street
Tulsa, Oklahoma 74119
(918) 587-3161

70290 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

13 pp

QUESTIONS PRESENTED
(According to Respondents)

1. Whether an employee's pay is "subject to reduction" within the meaning of the Secretary of Labor's "salary basis test," 29 C.F.R. § 541.118(a), where the employer stipulated that it has a policy under which the employee's pay is subject to being reduced, but where the employer has never reduced the pay of the employee.

> (a) If not, is such an employee's pay "subject to reduction" within the meaning of the salary basis test if the employer, pursuant to its policy, has reduced the pay of another employee in the same classification?
>
> (b) If the only such pay-reduction occurred prior to the employer becoming subject to the Fair Labor Standards Act, would an employee who entered the same classification after the Act became applicable be non-salaried?

2. Whether the salary basis test, 29 C.F.R. § 541.118(a), may be validly applied to employees of a governmental body whose pay system is not based upon a public accountability law or principle.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Statement of Jurisdiction 1

Statement of the Case 1

Reasons for Denying the Writ 1

I. The facts and issues of this case are significantly different from those of *Auer.* 1

II. The second question presented by Petitioner is not before this Court in *Auer.* 5

III. There is no compelling reason for this Court to address the second question presented. 6

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Auer et al. v. Robins, 65 F.3d 710 ..... 1, 2, 3, 5, 6

Avery v. City of Talladega, Ala., 24 F.3d 1337 (11th Cir. 1994) 5

Contents

	Page
Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923)	9
McDonnell v. City of Omaha, 999 F.2d 293 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163, 114 S. Ct. 1188 (1994)	2
Mueller v. Reich, 54 F.3d 438 (7th Cir. 1995)	6, 7
Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955)	9
Service Employees Int'l. Union, Local 102 v. County of San Diego, 60 F.3d 1346 (9th Cir. 1994), *cert. denied*, __ U.S. __, 116 S. Ct. 774, 133 L. Ed. 2d 726 (1996)	7
Statutes Cited:	
28 U.S.C. § 1254(1)	1
29 U.S.C. § 201 *et seq.*	5
Other Authorities Cited:	
29 C.F.R. § 541.118(a)	i
29 C.F.R. § 541.118(a)(6)	2

STATEMENT OF JURISDICTION

The jurisdiction of this Court over the second question presented is properly invoked pursuant to 28 U.S.C. § 1254(1). As to the two (2) sub-issues of the first question presented, however, this Court lacks jurisdiction to grant a writ of certiorari, in that neither was decided by the court of appeals to which the writ would issue. *See* Questions Presented (According to Respondents), *supra* at i, Nos. 1(a) and 1(b).

STATEMENT OF THE CASE

Respondents concur in Petitioner's statement of the case except Petitioner's statement that "the issues presented in the present case are nearly identical to the issues presented before this Court in *Auer, et al. v. Robbins, et al.*, No. 95-897." Petition for Writ of Certiorari, p. 6. As discussed *infra*, only the first question presented by Petitioner (and, arguably, only part of that question) has been briefed by both sides in *Auer.*

REASONS FOR DENYING THE WRIT

I.

THE FACTS AND ISSUES OF THIS CASE ARE SIGNIFICANTLY DIFFERENT FROM THOSE OF *AUER.*

The only reason offered by Petitioner to support the issuance of a writ of certiorari is that this case presents issues substantially similar to those pending in *Auer.* Because the facts and issues in *Auer* are clearly dissimilar to those in the instant record, however, this Court's consideration of *Auer* does not merit the granting of Petitioner's request.

In *Auer,* the Eighth Circuit held that "the mere possibility of an improper deduction in pay does not defeat an employee's salaried status." *Auer,* 65 F.3d at 710, citing *McDonnell v. City of Omaha,* 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied,* 510 U.S. 1163, 114 S. Ct. 1188 (1994). The police sergeants in *Auer* were able to establish initially that one improper deduction had been made from the salary of one sergeant. However, the Eighth Circuit applied the "window of correction" provided in 29 C.F.R. § 541.118(a)(6) to nullify the effect which that particular deduction would have had upon the sergeants' salaried status. The court stated, "Under the *unique circumstances* surrounding Sergeant Guzy's disciplinary loss of pay, we believe that the Department made a *one-time deduction*, and did not make the disciplinary deduction from Sergeant Guzy *pursuant to an established policy*." *Auer,* 65 F.3d at 711 (emphasis added). The Court also found that "the Guzy disciplinary incident was a one-time incident that can never reoccur [sic] because the Department has since changed its policy." *Auer*, 65 F. 3d at 711.

In the present case, the Tenth Circuit not only found that Respondents were subject to reductions in pay for disciplinary reasons, pursuant to an express policy of Petitioner, Pet. App. A-19 to A-20, but also cited "uncontroverted evidence that district chiefs have been disciplined, on more than one occasion, by a reduction in pay for a reason other than an infraction of a safety rule of major significance." Pet. App. A-23. (internal quotation marks omitted)

Petitioner argued on appeal that the "window of correction" provided by 29 C.F.R. § 541.118(a)(6) saved its claimed exemptions. The Tenth Circuit noted that this argument had not been raised in the district court and properly held that "issues raised for the first time on appeal will not be reviewed except for the most manifest error." Pet. App. A-24 to A-25. The Tenth Circuit also held, "Even if we were to consider the City's argument, we find no merit to it." Pet. App. A-25.

The Tenth Circuit cited *Auer* as authority that the "window of correction" is not available if the employer has a settled policy of making improper deductions from compensation. Pet. App. A-25 (citing *Auer*, 65 F.3d at 711). The court noted that "the City has at least *one settled policy* of making improper deductions from the Plaintiffs' compensation (*i.e.*, deductions from pay for disciplinary infractions), and is not entitled to the 'window of correction.'" Pet. App. A-25. (emphasis added)

The fact-differences between *Auer* and the present case are apparent and material. In *Auer*, the court found that the public employer did not have a "settled" policy authorizing pay-deductions for disciplinary reasons, and found that the public employer had clarified its unsettled policy to prevent a recurrence of any improper deduction. Here, the Tenth Circuit found that Petitioner has a "settled policy of making improper deductions . . . for disciplinary infractions." Pet. App. A-25. Petitioner did not argue on appeal (or assert in its Petition) that it has clarified or modified that policy.

In *Auer*, the court nullified, by application of the "window of correction," the only pay-deduction which could have entitled the plaintiffs to status as non-exempt employees, whereas in this case, the Tenth Circuit found that (a) Petitioner had failed to raise the "window of correction" argument in the district court, and (b) even if the issue had been properly preserved for appeal, Petitioner could not validly invoke the "window of correction" defense because Petitioner did not maintain that any pay-deduction for disciplinary reasons had been done on a one-time basis or unintentionally. Pet. App. A-25.

This Court may affirm *Auer* by holding that although an actual deduction from pay pursuant to a settled policy is required to establish that an employee is non-salaried, the plaintiffs in *Auer* showed neither the existence of a settled policy nor any

actual deduction based upon such policy. Such a holding by this Court would not cause a different outcome in the present case upon remand to the Tenth Circuit: Respondents established *by stipulation* the existence of the settled policy of making improper pay-reductions for disciplinary infractions **and** the existence of actual deductions for such infractions.

Petitioner may be asking this Court to grant certiorari upon a sub-issue of its first question: If one employee in a particular job-classification has suffered, in accordance with the employer's policy, a pay-reduction for a minor disciplinary infraction, is every person working in that classification "non-salaried"? This sub-issue was not discussed by the Tenth Circuit, and it is not clear that Petitioner raised it sufficiently.[1]

The second sub-issue in Petitioner's first question is the Tenth Circuit's reliance on actual deductions made prior to the FLSA's application to public employers. This sub-issue was not discussed by the Tenth Circuit, and it is not clear that Petitioner raised it sufficiently.[2] Petitioner has not offered any independent reason for this Court to consider either sub-issue.[3]

---

1. Nowhere in its opinion does the Tenth Circuit identify this sub-issue as a matter asserted to be error. In discussing the docking of pay for disciplinary infractions, the court concludes that Petitioner's complaint about the disciplinary aspect of the salary basis test is *pro forma*: "Significantly, the City has not challenged the court's factual findings on this issue or the court's legal conclusion." Pet. App. A-23. The district court's opinion gives no indication that Petitioner raised this sub-issue.

2. *See* footnote 1.

3. Although Petitioner asserts that there is a conflict among the circuit courts of appeal regarding the first question presented, only one circuit has decided the effect of disciplinary deductions taken from the pay of fewer

(Cont'd)

The Tenth Circuit reviewed *Auer* knowing that certiorari had been granted by this Court.[4] Contrary to Petitioner's argument in footnote 4 of its Petition, the issues in *Auer* do not suggest that the Tenth Circuit would reverse itself if this Court affirms *Auer* and remands the present case for re-consideration in light of the affirmance.

II.

THE SECOND QUESTION PRESENTED BY PETITIONER IS NOT BEFORE THIS COURT IN *AUER*.

Again, the only argument offered by Petitioner is that the issues presented in its Petition concern substantially the same issues raised in *Auer*. Although Petitioner's second question (*i.e.*, applicability of the salary basis test to public employees) was initially presented by the petitioners in *Auer*, it was not briefed by both sides.[5]

(Cont'd)

than all plaintiffs or from the pay of non-plaintiffs. *See Avery v. City of Talladega, Ala.*, 24 F.3d 1337, 1342 (11th Cir. 1994) (suspension without pay of one police lieutenant nullified not only his salaried status but that of other lieutenants as well). No circuit has decided how remote in time actual deductions may be and still qualify as events that affect the status of an employee entering the same classification as those employees who suffered the actual deductions.

4. This Court granted certiorari in *Auer* on June 24, 1996. The Tenth Circuit rendered its decision in this case on September 13, 1996. The Tenth Circuit cited the Eighth Circuit's opinion in *Auer*, noting this Court's grant of certiorari. Pet. App. A-25.

5. The petitioners in *Auer* preliminarily set forth the question "Does the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, ("FLSA") salary basis test of 'white collar' FLSA exemptions apply to public employees?" (petition

(Cont'd)

Given that this issue has not been squarely presented in *Auer,* Petitioner's argument that this Court should grant certiorari on its second question because a similar issue is involved in *Auer* must fail. Petitioner has not presented any independent reason for this Court to grant certiorari on its second question.

III.

THERE IS NO COMPELLING REASON FOR THIS COURT TO ADDRESS THE SECOND QUESTION PRESENTED.

The second question presented by Petitioner involves the applicability of the salary basis test to public employees. Petitioner has offered no reason to grant certiorari on this issue other than Petitioner's mistaken belief that this Court is considering the same question in *Auer.* In the last paragraph of the Petition, it is contended that there is a conflict among the circuits regarding whether the salary basis test constitutionally applies to the public sector. Petition, p. 9. Petitioner, however, has offered no authority or analysis to support this contention.

All circuits that have considered Petitioner's second question have upheld the validity of the current salary test as applied to public employers. The Tenth Circuit noted that "only the Seventh and Ninth Circuits have considered similar challenges to the validity of the salary test." Pet. App. A-9. The Seventh Circuit in *Mueller v. Reich,* 54 F.3d 438 (7th Cir. 1995), petition for certiorari filed October 10, 1995 (No. 95-586), held

---

(Cont'd)

for writ of certiorari in *Auer,* p. i) but did not argue it in the body of their petition or in their brief on the merits. The respondents in *Auer* did discuss this sub-issue in their brief on the merits. The Eighth Circuit in *Auer* pointed out that neither side had raised this particular question. 65 F.3d at 710 n.6.

that the current salary basis test is rationally related to the objectives of FLSA and therefore valid. 54 F.3d at 442. The Tenth Circuit in the present case agreed with the holding in *Mueller.* Pet. App. A-11. The Ninth Circuit in *Service Employees Int'l. Union, Local 102 v. County of San Diego,* 60 F.3d 1346 (9th Cir. 1994), *cert. denied,* __ U.S. __, 116 S. Ct. 774, 133 L. Ed. 2d 726 (1996), also upheld the validity of the current salary basis test. *Service Employees,* 60 F.3d at 1353 ("The 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability.").

The Ninth Circuit did, however, hold in *Service Employees* that the salary basis test as it existed prior to September 6, 1991 (the date on which the DOL issued its final interim regulation) is invalid as applied to public sector employers. The Court opined that "because virtually all public employers are constrained by a pay system based on public accountability, most public employees could not satisfy the salary test as it existed prior to September 6, 1991." *Service Employees,* 60 F. 3d at 1352.

The Tenth Circuit in the present case disagreed with the Ninth Circuit's invalidation of the salary basis test as it existed prior to September 6, 1991, because the Tenth Circuit declined to adopt the presumption that the pay systems of governmental bodies are based on public accountability laws or principles. Pet. App. A-11. The Tenth Circuit specifically noted that Petitioner had not shown its own system to be predicated on any public accountability law. Pet. App. A-14. Petitioner's second question asks whether the salary-basis test is applicable to the public sector, but Petitioner failed to lay the evidentiary foundation necessary to resolve this question in its favor.

Petitioner argued to the Tenth Circuit that application of

the salary-basis test to its employees is invalid because a public employer whose pay system is based upon a public accountability law or principle is required to make a deduction whenever an employee is absent for part of a day, yet the "docking" aspect of the salary-basis test erroneously presupposes that all public employers have the option not to make such deductions.

Both in the district court and in the Tenth Circuit, however, Petitioner failed to present sufficient evidence that its pay system is based upon a public accountability law or principle. "After our review of the record, we agree with the district court that the City failed to satisfy its burden of demonstrating its pay system is based upon a public accountability law or principle." Pet. App. A-14. The Tenth Circuit noted "the uncontroverted evidence in this case indicates that salary deductions are discretionary on the part of the City." Pet. App. A-15. Petitioner does not qualify as a public employer caught between (1) an externally-imposed pay system requiring a deduction from pay for every part-day absence and (2) the salary-basis test which requires payment of overtime wages if employees are subject to such deductions.

Some public employers may find themselves in an anomalous situation where a state or local law mandates the very deductions which, under the salary basis test, destroy the exempt status of employees. Petitioner failed, both in the district court and on appeal, to establish that its own pay system poses such a dilemma.

CONCLUSION

Petitioner has not presented any compelling reason for the issuance of a writ of certiorari. The present case is not one "involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . ." *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712, 714 (1923). This Court "does [not] sit for the benefit of the particular litigants," and certiorari will be granted only to reach "a problem beyond the academic or episodic." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897, 901 (1955).

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT A. NANCE
Counsel of Record
DONALD M. BINGHAM
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
Attorneys for Respondents
502 West Sixth Street
Tulsa, Oklahoma 74119
(918) 587-3161